Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-858

PUBLIC BROADCASTING SERVICE,

Petitioner,

v.

THE NETWORK PROJECT, *et al.*,

Respondent.

No. 77-864

CORPORATION FOR PUBLIC BROADCASTING,

Petitioner,

v.

THE NETWORK PROJECT, *et al.*,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

NO. 77 - 858

PUBLIC BROADCASTING SERVICE,

Petitioner,

v.

THE NETWORK PROJECT, et al.,

Respondent.

NO. 77 - 864

CORPORATION FOR PUBLIC BROADCASTING,

Petitioner,

v.

THE NETWORK PROJECT, et al.,

Respondent

Brief In Opposition to Petitions for
Writ of Certiorari to the
United States Court of Appeals
For the District of
Columbia Circuit

STATEMENT OF THE CASE

Plaintiffs in this action are viewers of public television, organizations which represent viewers, and producers of television programming who suffered financial injury because their work was improperly censored by some or all of the defendants. Named as defendants were the Corporation for Public Broadcasting (CPB),[1] the Public

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1. CPB was "established pursuant to congressional authorization as a conduit for federal funds for public television." Opinion of the court of appeals at 1a. (Except as otherwise indicated all references are to the appendix of the Petition of the Public Broadcasting Service).

Broadcasting Service (PBS),[2] Clay T. Whitehead, former Director of the Office of Telecommunications Policy and Patrick J. Buchanan, former Special Assistant to President Nixon.[3] The complaint alleged in essence that the defendants, acting singly and in concert, subjected the content of public television to censorship in violation of the First Amendment and the Public Broadcasting Act of 1967, 47 U.S.C. §396 et seq. (1970 and Supp. V 1975).

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2. PBS was "created by CPB to distribute public television programs to local stations," Id. at 1a - 2a.

3. The claims against defendants Whitehead and Buchanan were dismissed as moot, 3a - 6a.

Jurisdiction was predicated, inter alia on 28 U.S.C. §1331, 1337, and 1361 (1970) and on the First Amendment.[4]

Shortly after the action was commenced, plaintiffs served and filed substantial discovery requests which included interrogatories, demands to produce documents and requests for admissions. There followed extensive motion practice. Rather than responding to these requests defendants sought and obtained various protective orders which were made effective until the disposition of tneir simultaneous motions to dismiss the action. Defendants PBS and CPB pursued a relatively common tack; each moved to dismiss on the

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4. Complaint, para. 1, Appendix to Brief for Appellants in the court of appeals, A 3.

grounds that there was a lack of jurisdiction over the subject matter, a failure to state a claim on which relief could be granted and a lack of standing. Defendants Buchanan and Whitehead moved jointly to dismiss on grounds substantially similar to those of PBS and CPB but coupled their motion with one for summary judgment. With respect to the latter they argued that their activities in relation to public broadcasting were undertaken in lawful exercise of their official responsibilities.[5] Voluminous affidavits and exhibits were filed in support of the Whitehead-Buchanan summary judgment motion. Following the resignations

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5. Federal Defendants' Motion to Dismiss or, in the Alternative, for Summary Judgment, filed September 14, 1973.

from federal service or defendants Whitehead (on September 15, 1974) and Buchanan (on November 15, 1974) mootness was added as a further defense by each of them.[6]

Although the defendants' motions to dismiss were all filed in September, 1973, the motions were not argued until January 17, 1975. This delay was occasioned primarily by the good faith but protracted efforts of the parties to settle the action, efforts which were unfortunately unsuccessful.

On July 23, 1975, the District Judge decided defendants' motions by

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6. Second Supplemental Memorandum In Support of Federal Defendants' Motion to Dismiss and/or in the Alternative for Summary Judgment, filed January 16, 1975.

(1) dismissing as moot the claims against defendants Whitehead and Buchanan, 28a - 32a; (2) dismissing, for failure to state a claim upon which relief could be granted, those allegations based on the Public Broadcasting Act of 1967 because it found that no private right of action was implied by that act, 32a - 35a, 42a; (3) holding that there was no jurisdiction over the subject matter of plaintiffs' First Amendment claims, 36a - 41a. The last ruling was bottomed on the district court's conclusions that neither CPB nor PBS were "agencies" within the meaning of 28 U.S.C. §1361, 36a, and that the jurisdictional amount required by 28 U.S.C. §1331 was unmet, 37a - 41a. The district court expressly avoided the question of jurisdiction

under 28 U.S.C. §1337 because, it held, its decision that there was no statutory right of action made unnecessary a resolution of the jurisdictional issue, 36a - 37a.[7] Nor, it held as a consequence, was there any occasion to address the issue of pendent jurisdiction over the constitutional claims, 37a n. 9. The court of appeals, in an opinion by Judge Robinson in which Judge Wikey and Judge Jameson concurred, affirmed the mootness finding as to defendant Whitehead,[8] but reversed the

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7. The district court's statement, at 42a, that there was a want of jurisdiction under 28 U.S.C. §1337 was apparently an error inasmuch as the question had been expressly reserved at 37a.

8. No appeal was taken from the dismissal of the action against defendant Buchanan.

dismissal on jurisdictional grounds. It held that jurisdiction to decide the statutory claims properly rested on 28 U.S.C. §1337, 8a - 10a, and that the constitutional claims were so closely related to the former that they constituted one constitutional case for the purposes of pendent jurisdiction, 10a. The court went on to hold that considerations of judicial economy, convenience and fairness required the exercise of pendent jurisdiction in this case. Accordingly, the issues which will be before the district court if certiorari is denied are whether the plaintiff television producers have valid claims for damages against CPB and PBS under the First Amendment and whether the plaintiff viewers have valid First Amendment

claims for injunctive and declaratory relief.

CERTIORARI SHOULD NOT BE GRANTED

Several factors combine to make this case particularly ill suited for a grant of certiorari. The decision below, which rests primarily on the wholly federal nature of this case, accords with an unbroken line of recent authority in this Court. The decision is not in conflict with decisions in other courts of appeals. It does not finally determine the action. Lastly, the question as to which certiorari is sought is one ultimately turning on the exercise of discretion which, in the absence of a result wholly departing from the principles generally applicable, is not a question which should occupy the attention of this Court.

Seeking certiorari in the face of these factors petitioners urge that the court of appeals wrongly evaluated the "'considerations of judicial economy, convenience and fairness' which underlie a proper exercise of pendent jurisdiction. . ."[9] In particular the petitioners argue that the lower court over-emphasized the importance of the federal nature of the pendent claim (i.e. that the defendants had violated the First Amendment).[10] An evaluation of the applicable decisions of this

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9. Petition of CPB at 7. See also Petition of PBS at 10.

10. Petition of CPB at 7; Petition of PBS at 11-12.

Court reveals, however, that the court of appeals considered the appropriate factors and reached a proper result.

In the case most relevant, Hagans v. Lavine, 415 U.S. 528 (1974), petitioners challenged a New York State regulation on the grounds that it violated the Equal Protection Clause of the Constitution and conflicted with the Social Security Act and regulations of the Department of Health, Education and Welfare. Jurisdiction was sought under 28 U.S.C. §1343. This Court, reversing the court of appeals, ruled that since there was jurisdiction over the constitutional claim and since that claim was not insubstantial it was "clear that the District Court could hear as a matter of pendent jurisdiction the claim of conflict

between federal and state law without determining that the latter claim in its own right was encompassed within §1343", 415 at 536. The Court went on to address the issue of whether, given the power to hear the pendent claim, the lower court should have exercised its discretion to do so, Id. at 415 U.S. 545 - 550. It rejected an argument strikingly similar to that presented by petitioners here[11] and held that where the pendent question "was essentially one of federal policy. . . the argument for the exercise of pendent jurisdiction was 'particularly strong,'" Id. at 415 U.S. 550, quoting Rosado v. Wyman, 397 U.S. 397, 404 (1970).

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11. See especially 415 U.S. at 545.

To be sure, the present case may be distinguished from Hagans in that here the pendent claim is constitutional rather that statutory. Seizing on this point petitioners argue that Hagans is not apposite[12] because the exercise of jurisdiction here will not allow the avoidance of a constitutional decision as it did in Hagans. But that case, rather than resting solely on the desirability of avoiding the unnecessary resolution of constitutional issues also stressed the importance of allowing a federal forum to entertain federal claims, 415 U.S. at 548 - 550. This point is especially relevant here: Not only is the cause

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12. Petition of PBS at 17 - 19; Petition of CPB at 10.

of action federal in nature but the case concerns the administration of a program funded and established by the United States under a federal statute dealing with a nation-wide system of communications.[13] These considerations counsel the correctness of the decision below insofar as it rested on Hagans. Reliance need not be placed on Hagans alone. Also supporting the court of appeals' conclusion is Romero v. International Terminal Operating Co., 358 U.S. 354, 380-381 (1959) in which this Court found, in the absence of the constitutional avoidance factor, pendent jurisdiction over federal maritime claims justifiable in part because of their federal nature. See also

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13. See notes 1 and 2, supra.

United Mine Workers v. Gibbs, 383 U.S. 715, 729 (1966).

The inherently federal nature of this case is not the only factor on which the decision below rests. The court of appeals said:

> We do not suggest that a federal court must automatically or necessarily assume jurisdiction of every pendent federal claim. . . we do say, however, that the involvement of federal law in a pendent claim is a factor significantly affecting the proper exercise of that discretion. 14a

The court of appeals did not articulate the other "considerations of judicial economy, convenience and fairness" 11a, which support its conclusion but other factors there surely are and they do support the result reached. First, the district judge had already expended considerable time and energy in evaluating

the statutory and constitutional claims and the relationships among the various defendants. This was necessary in order to make a reasoned determination of the private right of action question, 32a - 35a, the jurisdictional amount question, 37a - 41a, and the mootness question, 28a - 32a. All of this was against the background of a novel and complex statutory scheme, the Public Broadcasting Act of 1967,[14] which is not easily mastered. Second, by holding the constitutional claim pendent to the statutory claim the court of appeals itself avoided the need to decide the difficult issue of whether the amount

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14. Set out in full at 47a - 64a.

in controversy requirement of 28 U.S.C. §1331 was in fact met, a question which thus remains open.[15] Third, the plaintiffs in this public interest action had themselves expended considerable energy litigating the case in the District Court through motion practice and discovery requests. The fairness

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15. See the district judge's discussion in his Opinion at 37a - 41a.

The evaluation of claimed jurisdictional amounts in the context of substantive constitutional claims has presented thorny problems which this Court has not yet resolved, see e.g. Spock v. David, 502 F.2d 953 (3d Cir. 1974) reversed on other grounds sub nom Greer v. Spock, 424 U.S. 828 (1976) (proper basis for determining whether the jurisdictional amount is met in First Amendment case involving pamphleteering is the cost of alternative means of transmitting the message). See also Cortright v. Resor, 325 F.Supp. 797, 810 (E.D.N.Y.), rev'd on other grounds, 447 F.2d 245, 250-251 (2d Cir. 1971), cert denied, 405 U.S. 965 (1972) (First Amendment rights inherently meet the jurisdictional amount; any other result would itself be unconstitutional).

factor militated against forcing them to start afresh in a state court which would be subject to a different code of procedure and which would be unfamiliar with the wholly federal issues raised by this case.

It is difficult to see how a further parsing of those factors of fairness, economy and convenience by this Court would be justified given the undeniable press on its docket of more weighty matters. This conclusion is supported by petitioner CPB's own analysis of the cases in the courts of appeals.[16] While it urges that there is a "rule of thumb" under which the pendent claim should have been dismissed,[17]

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16. Petition of CPB at 13 - 15.

17. Petition of CPB at 14. See also Petition of PBS at 10 note 14

petitioner concedes that none of the cases it cites to establish this rule involved pendent federal claims. This is tantamount to admitting that no conflict among the circuits exists, for the federal nature of the pendent claim primarily informed the ruling of the court of appeals.

Nor did Aldinger v. Howard, 427 U.S. 1 (1976) require a different result.[18] That case, holding that the pendent jurisdiction doctrine did not support the exercise of federal jurisdiction over a state law claim against a party not otherwise subject to federal jurisdiction is inapposite. As this Court, speaking through Mr.

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18. Compare Petition of CPB at 12.

Justice Rehnquist, said:

> The situation with respect to the impleading of a new party, however, strikes us as being both factually and legally different from the situation facing the Court in Gibbs and its predecessors. 427 U.S. 14, 19

In sum, given the firm legal footing on which the decision below stands, the absence of a conflict among the circuits, the wholly federal nature of the case, and the discretionary nature of the decision itself, no reason exists for granting the writ.

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19. See also, Id. at 427 U.S. 15 - 16.

CONCLUSION

For all of the reasons stated, the petitions should be denied.

Respectfully submitted,

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